Supreme Court, U.S.
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No. 99-

IN THE

# Supreme Court of the United States

WILLIAM KAY,

*Petitioner,*

*v.*

J. ANDREW SMYSER, HONORABLE, (U.S. Magistrate); TULLIO GENE LEOMPORRA, HONORABLE, (Judge); SYLVIA H. RAMBO, HONORABLE, (Chief Judge); EDWIN M. KOSIK, HONORABLE, (Judge); JAMES F. McCLURE, JR., HONORABLE, (U.S. District Judge); THOMAS I. VANASKIE, HONORABLE, (U.S. District Judge); WILLIAM J. NEALON, HONORABLE, (U.S. District Judge); MALCOLM MUIR, HONORABLE, (U.S. District Judge); RICHARD P. CONABOY, HONORABLE, (U.S. District Judge); WILLIAM W. CALDWELL, HONORABLE, (U.S. District Judge); JOHN DOE SEILER, (ATF Agent); DANIEL T. DEMUTH, (U.S. Probation Officer); BARBE H. SEMPA, (Deputy Clerk, U.S. District Court); DAVID M. BARASCH, (U.S. Attorney); CHERYL M. MURPHY, (Deputy Clerk, U.S. District Court); GERALD P. DEMPSY, (U.S. Pretrial Service Officer); MARY E. D'ANDREA, (Head Clerk); RALPH MEGLIOLA, (ATF Informant/Agent); ERIC PFISTERER, (Assistant U.S. Attorney) and JACK McMAHON, (Attorney),

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals enter a decision that is in conflict with other Courts of Appeals in failing to liberally construe the complaint of the Petitioner, who was acting *pro se* against federal officials who allegedly deprived him of fundamental constitutional rights in a federal criminal matter?

II. Did the Court of Appeals decide important questions of federal law in a way that conflicts with this court's opinions in *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Bell v. Hood*, 327 U.S. 678 (1946)?

## LIST OF PARTIES NOT PARTICIPATING AT THIS LEVEL

Gretchen Mroczkowski, (Special Agent ATF); Scott R. Endy, (ATF agent); John Doe Rossman, (ATF Agent); S. Taylor (Properly Disposal Technician); Robert L. Burrows, (Firearms Enforcement Officer); Richard D. Craze, (Firearms Enforcement Officer); John Doe (ATF Agent); Agent Slusser, (ATF Agent)

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The Petitioner William Kay respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINIONS BELOW

The unreported Per Curiam Opinion of the United States Court of Appeals for the Third Circuit is reprinted in the Appendix at App. 3a-8a. The May 27, 1998, and September 2, 1998, Orders of the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 97-cv-05813, which dismissed the Petitioner's complaint, and its separate order entered September 2, 1998, which dismissed the complaint for failure to make proper service and denied all pending motions as moot, are reprinted in the Appendix at App. 9a-11a.

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, filed on August 9, 1999, affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania, entered September 2, 1998, which dismissed the petitioner's complaint.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION AND RULES INVOLVED

Title 28, Section 2255, of the United States Code provides in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Rule 8(a) of the Federal Rules of Civil Procedure provides in relevant part:

> A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Rule 12(b) of the Federal Rules of Civil Procedure provides in relevant part:

> **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted. . . .

## STATEMENT OF THE CASE

The Petitioner William Kay instituted this civil action in September, 1997, in the United States District Court for the Eastern District of Pennsylvania against 25 named federal defendants, including various federal judges, a federal magistrate, and other federal employees, and against the defense attorney (the "Respondents") who represented the Petitioner in connection with certain federal criminal charges that lay at the heart of this dispute. The Petitioner was charged with possessing or transferring a machine gun in violation of 18 U.S.C. § 922(o) and with possessing, receiving, or transferring a firearm that is not registered in the National Firearms Registration and Transfer Record and without provisional taxes being paid, in violation of 26 U.S.C. §§ 5861(d) and (e).

Federal jurisdiction in the District Court below in this case is founded upon 28 U.S.C. § 1331, which grants to the district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The District Court below had federal question jurisdiction

over this matter because it constitutes a *Bivens*-type action. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *see also Ghent v. Lynn*, 392 F. Supp. 879 (D. Conn. 1975) (stating that any claim against the federal government, even though it does not require the interpretation of a federal statute or regulation, is still one arising under federal common law and, as such, is a claim under laws of the United States within the meaning of 28 U.S.C. § 1331).

The District Court determined initially that the Petitioner's complaint did not comply with Fed. R. Civ. P. 8(a) and that the Petitioner had failed to serve the defendants as required by Fed. R. Civ. P. 4. The District Court entered an order that directed the Petitioner to file an amended complaint complying with Fed. R. Civ. P. 8 and to properly serve all defendants within 30 days or suffer dismissal of his action.

The Petitioner filed an amended complaint, which added one additional federal defendant, within the time set forth by the District Court. The federal defendants moved to dismiss the amended complaint on the grounds that proper service had not been effected, the complaint still did not comply with Fed. R. Civ. P. 8, and that the complaint failed to state a claim on which relief could be granted. The Petitioner's former defense attorney also moved to dismiss the amended complaint on these grounds.

The District Court did not address the Petitioner's claims in a separate opinion. Instead, it entered orders on May 27, 1998, and September 2, 1998, dismissing the complaint as to all but one defendant "upon consideration of" defendants' motions to dismiss. By separate order entered September 2,

1998, the District Court dismissed the complaint for failure to make proper service and denied all pending motions as moot, this ensuring the finality of its previous orders.

The United States Court of Appeals for the Third Circuit, exercising plenary review over the District Court's order, concluded that it appeared beyond doubt that the Petitioner could not prove any set of facts in support of his claims that would entitle him to relief and that the District Court had properly granted the Respondents' motions to dismiss the amended complaint for failure to state a claim.

The Petitioner's complaint challenged his arrest and detention and attacked his criminal conviction in connection with his alleged violations of federal firearms statutes. The Petitioner sought injunctive relief in the form of an order "rescinding" the charges against him and "expunging all charges" from his records. The Petitioner's amended complaint included allegations of kidnaping and false imprisonment, a failure to notify him of his constitutional rights, the filing of a criminal complaint, the denial of his right to a trial, and the acceptance of a plea agreement that he entered while under duress. The amended complaint included allegations of other illegal conduct on the part of several federal district court judges and magistrate judges, court personnel, and employees of the Office of the United States Attorney that resulted in the Petitioner's imprisonment for the unlawful possession and transfer of a machine gun in violation of 18 U.S.C. § 922(o).

The Petitioner had earlier challenged his conviction by filing a motion pursuant to 28 U.S.C. § 2255 in the District Court and requesting a certificate of appealability in the Third Circuit. *See M.D. Pa. Crim. No.* 96-cr-00086, an order

entered August 28, 1998, denying the § 2255 motion; *C.A. No.* 98-7545, an order entered March 16, 1999, denying the request for a certificate of appealability.

## REASONS FOR GRANTING THE WRIT

### I.

### THE COURT OF APPEALS ENTERED A DECISION THAT IS IN CONFLICT WITH OTHER COURTS OF APPEALS IN FAILING TO LIBERALLY CONSTRUE THE COMPLAINT OF THE PETITIONER, WHO WAS ACTING *PRO SE*

The Ninth Circuit recognized in *Johnson v. Reagan*, 524 F.2d 1123 (9th Cir. 1975), that pleadings should be liberally construed in the interests of justice, particularly when the pleader is not learned in the law. The Fifth Circuit took the same position in *Watson v. Ault*, 525 F.2d 886 (5th Cir. 1976), in which it held that a *pro se* complaint by a prisoner is governed by less stringent standards than are formal pleadings drafted by lawyers.

In this case, the Third Circuit took an entirely different tack, examining the allegations of the Petitioner under a legalistic magnifying glass and agreeing with the conclusions of the District Court that the Petitioner's richly detailed complaint could not possibly cross the low threshold erected by Pa. R. Civ. P. 8(a) and was subject to summary dismissal. Yet the Third Circuit, in reviewing the allegations of the Petitioner's complaint and his amended complaints, found it sufficiently detailed to conclude that the complaints:

- Sought injunctive relief in the form of an order "rescinding" the charges against him and "expunging all charges" from his records;

- Included allegations of kidnaping and false imprisonment;

- Contended that the respondents had failed to notify him of his constitutional rights;

- Averred that he had been denied his right to a trial and had accepted a plea agreement while under duress; and

- Stated that federal district court judges and magistrate judges, court personnel, and employees of the Office of the United States Attorney had engaged in other illegal activity that had resulted in the Petitioner's imprisonment for the unlawful possession and transfer of a machine gun in violation of 18 U.S.C. § 922(o).

The Third Circuit buttressed its decision by relying on this Court's opinion in *Heck v. Humphrey*, 512 U.S. 477 (1994). *Heck*, however, is inapposite. In that case, the petitioner was serving a 15-year sentence in a state prison for the murder of his wife and, while the appeal from his conviction was still pending, filed a *pro se* suit under 42 U.S.C. § 1983 against the county prosecutors and a state police investigator. 512 U.S. at 478-79. The Third Circuit's quotation from *Heck* in its opinion is taken out of context. The complete quotation is as follows:

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

This court then went on to conclude: "A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983." 512 U.S. at 487.

As this is not a § 1983 action and the Petitioner, as acknowledged by the Third Circuit in its opinion, is seeking additional remedies, some of which are in the nature of an injunction, *Heck* is not applicable here.

The Petitioner's complaint, if given the benefit of the doubt to which *pro se* pleadings normally are entitled, stated cognizable claims in the nature of various torts against the named government officials and his former lawyer. For example, in *Wounded Knee Legal Defense/Offense Committee v. Federal Bureau of Investigation*, 507 F.2d 1281 (8th Cir. 1974), the Eighth Circuit recognized that a suit for violation of constitutional rights was within a district court's federal question jurisdiction when the plaintiffs alleged that FBI agents had harassed and intimidated them.

In short, if the District Court and the Third Circuit had given the Petitioner's complaint the generous interpretation that *pro se* complaints traditionally have been afforded, the Petitioner would have been given his day in court and an opportunity to rectify a grave injustice that has stained his life and his reputation.

## II.

## THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THIS COURT'S OPINION IN *HECK v. HUMPHREY* AND *BELL v. HOOD*

As explained in Issue I., the Court of Appeals misapplied the holding of this court in *Heck v. Humphrey*, 512 U.S. 477 (1994), in ruling that the District Court had correctly concluded that Petitioner's complaint did not state facts sufficient to avoid summary dismissal. That part of the argument in Issue I. is incorporated here by reference.

The reasoning of the Third Circuit in this case also ignores the holding of this Court in *Bell v. Hood*, 327 U.S. 678 (1946), in which the plaintiffs sued agents of the Federal Bureau of Investigation to recover damages resulting from the plaintiffs' imprisonment and the search and seizure of their premises. The federal district judge dismissed the action on his own motion on the ground that the court lacked federal question jurisdiction. The Court of Appeals affirmed on the same ground.

Reversing, this Court pointed out that a reading of the complaint made it clear that the plaintiffs sought recovery on the ground that the defendants had violated fundamental

constitutional rights. 327 U.S. at 681. In the case at bar, the Petitioner is effectively alleging that his right to due process under the Fifth Amendment was violated by the federal officials involved in his prosecution, conviction, and incarceration. The parallels between the facts of this case with those in *Bell* is striking, and the same result should be reached in both. This Court emphasized in *Bell* that

> where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.

327 U.S. at 684. Altogether too quick to point out the flaws and shortcomings in a layman's courageous attempt to challenge the manner in which federal officials, abetted by his own defense attorney, deprived him of his fundamental constitutional rights, the courts below should have embraced the philosophy espoused in *Bell* and given the Petitioner what every American is entitled to: his day in court and an opportunity to obtain the necessary relief that would make him whole and serve to deter other government officials from treating *pro se* litigants as bothersome impediments to the efficient dispensing of justice.

Average citizens, as well as many attorneys, regard our federal court system as an intimidating, sometimes terrifying, monolith that is inaccessible and impenetrable to the individual litigant. This case illustrates the barely concealed contempt with which the federal courts deal with a citizen who dares to seek recompense for what he regards as inhuman and unconstitutional treatment by our court system.

This Court should take this opportunity to rectify this miscarriage of justice and send an important message to the officers and employees of our federal judiciary that the rights of the individual are still paramount in our nation.

## CONCLUSION

Accordingly, I respectfully request that my petition for certiorari be granted.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AUGUST 9, 1999**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1835

WILLIAM KAY,

Appellant

v.

J. ANDREW SMYSER, HONORABLE, (U.S. Magistrate); TULLIO GENE LEOMPORRA, HONORABLE, (Judge); SYLVIA H. RAMBO, HONORABLE, (Chief Judge); EDWIN M. KOSIK, HONORABLE, (Judge); JAMES F. MCCLURE, JR., HONORABLE, (U.S. District Judge); THOMAS I. VANASKIE, HONORABLE, (U.S. District Judge); WILLIAM J. NEALON, HONORABLE, (U.S. District Judge); MALCOLM MUIR, HONORABLE, (U.S. District Judge); RICHARD P. CONABOY, HONORABLE, (U.S. District Judge); WILLIAM W. CALDWELL, HONORABLE, (U.S. District Judge); GRETCHEN MROCZKOWSKI, (Special Agent ATF); SCOTT R. ENDY, (ATF Agent); JOHN DOE SEILER, (ATF Agent); JOHN DOE ROSSMAN, (ATF Agent); S. TAYLOR, (Property Disposal Technician); ROBERT L. BURROWS, (Firearms Enforcement Officer); RICHARD D. CRAZE, (Firearms Enforcement Officer); DANIEL T. DEMUTH, (U.S. Probation Officer); BARBE H. SEMPA, (Deputy Clerk, U.S. District Court); DAVID M. BARASCH,

*Appendix A*

(U.S. Attorney); CHERYL M. MURPHY, (Deputy Clerk, U.S. District Court); GERALD P. DEMPSY, (U.S. Pretrial Service Officer); MARY E. D'ANDREA, (Head Clerk); RALPH MEGLIOLA, (ATF Informant/Agent); ERIC PFISTERER, (Assistant U.S. Attorney); JACK MCMAHON, (Attorney); JOHN DOE (ATF Agent); AGENT SLUSSER, [ATF Agent]

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 97-cv-05813)
District Judge: Honorable Robert F. Kelly

Submitted Under Third Circuit LAR 34.1(a)
July 6, 1999

Before: SLOVITER, ROTH and ROSENN, Circuit Judges

**JUDGMENT**

This case came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1 (a). On consideration whereof, it is now here ORDERED AND ADJUDGED by this court that the judgment of the District Court entered September 2, 1998 be and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ [illegible]
Acting Clerk

Dated: 9 August 1999

## APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED AUGUST 9, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1835

WILLIAM KAY,

Appellant

v.

J. ANDREW SMYSER, HONORABLE, (U.S. Magistrate); TULLIO GENE LEOMPORRA, HONORABLE, (Judge); SYLVIA H. RAMBO, HONORABLE, (Chief Judge); EDWIN M. KOSIK, HONORABLE, (Judge); JAMES F. MCCLURE, JR., HONORABLE, (U.S. District Judge); THOMAS I. VANASKIE, HONORABLE, (U.S. District Judge); WILLIAM J. NEALON, HONORABLE, (U.S. District Judge); MALCOLM MUIR, HONORABLE, (U.S. District Judge); RICHARD P. CONABOY, HONORABLE, (U.S. District Judge); WILLIAM W. CALDWELL, HONORABLE, (U.S. District Judge); GRETCHEN MROCZKOWSKI, (Special Agent ATF); SCOTT R. ENDY, (ATF Agent); JOHN DOE SEILER, (ATF Agent); JOHN DOE ROSSMAN, (ATF Agent); S. TAYLOR, (Property Disposal Technician); ROBERT L. BURROWS, (Firearms Enforcement Officer); RICHARD D. CRAZE, (Firearms Enforcement Officer); DANIEL T. DEMUTH, (U.S. Probation Officer); BARBE H. SEMPA, (Deputy Clerk, U.S. District Court); DAVID M. BARASCH,

(U.S. Attorney); CHERYL M. MURPHY, (Deputy Clerk, U.S. District Court); GERALD P. DEMPSY, (U.S. Pretrial Service Officer); MARY E. D'ANDREA, (Head Clerk); RALPH MEGLIOLA, (ATF Informant/Agent); ERIC PFISTERER, (Assistant U.S. Attorney); JACK MCMAHON, (Attorney); JOHN DOE (ATF Agent); AGENT SLUSSER, [ATF Agent]

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 97-cv-05813)
District Judge: Honorable Robert F. Kelly

Submitted Under Third Circuit LAR 34.1(a)
July 6, 1999

Before: SLOVITER, ROTH AND ROSENN, *Circuit Judges*

(Filed: August 9, 1999)

**OPINION**

PER CURIAM,

Appellant, William Kay, appeals from the District Court's orders granting appellees' motions to dismiss and dismissing his amended complaint with prejudice. For the reasons that follow, we agree that Kay's amended complaint was subject to summary dismissal and, thus, we will affirm the District Court's final order of dismissal.

*Appendix B*

In March 1996, Kay was charged with possessing or transferring a machine gun in violation of 18 U.S.C. § 922(o) and with possessing, receiving, or transferring a firearm which is not registered in the National Firearms Registration and Transfer record and without provisional taxes being paid in violation of 26 U.S.C. § 5861 (d) and (e). He agreed to plead guilty to the section 922(o) count in exchange for an 18 month sentence. The plea was negotiated by his attorney, Jack McMahon, and Kay was subsequently sentenced to 18 months imprisonment followed by a two year period of supervised release. No appeal from the judgment of conviction was taken.

In September 1997, Kay filed a complaint in the United States District Court for the Eastern District of Pennsylvania against 25 named federal defendants and Attorney Jack McMahon, seeking declaratory and injunctive relief as well as compensatory and punitive damages in excess of $300 million dollars. After determining that the complaint failed to comply, even minimally, with Fed. R. Civ. P. 8(a) and that Kay failed to properly serve the defendants in accordance with Fed. R. Civ. P. 4, the District Court entered an order directing appellant to file an amended complaint conforming to Rule 8 and to properly serve all defendants within thirty days or suffer dismissal of the action. Kay filed his amended complaint, adding one additional federal defendant, within the time frame set by the District Court. The federal defendants once again filed a motion to dismiss the amended complaint arguing, *inter alia*, that proper service had not been effected, that the amended complaint still fell short of compliance with the requirements of Rule 8, and that Kay's complaint failed to state a claim for which relief could be

granted. Attorney McMahon also filed a motion to dismiss on these same grounds. Although the District Court did not address Kay's claims in a separate opinion, it did enter orders on May 27, 1998, and September 2, 1998, dismissing the complaint as to all but one defendant "upon consideration of" defendants' motions to dismiss. Also, by separate order entered September 2, 1998, the District Court dismissed the complaint for failure to make proper service and denied all pending motions as moot, thus ensuring the finality of its previous orders.

We exercise plenary review over a District Court's order dismissing a complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. We will affirm a dismissal for failure to state a claim if we can "say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *McDowell v. Delaware State Police*, 88 F.3d 188, 189 (3d Cir. 1996) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). After careful scrutiny of appellant's amended complaint and the parties' submissions on appeal, we agree with the conclusion of the appellees and the District Court that appellant has failed to assert a claim upon which relief can be granted.

While appellant's amended complaint is a far cry from the "short and plain statement" required by Fed. R. Civ. P. 8(a), the essence of Kay's complaint is undoubtedly a challenge to his arrest and detention and an attack on his criminal conviction for which he seeks injunctive relief in

the form of an order "rescinding" the charges against him and "expunging all charges" from his records. *See* Amended Complaint at ¶¶ 68(2), (4), and (6). As noted by the appellees, Kay's amended complaint consist of allegations of kidnaping and false imprisonment (¶¶ 31, 33, 34, 35, and 36), failure to notify him of his rights (¶ 34), the filing of a criminal complaint (¶ 14), the denial of his right to a trial and the acceptance of a plea agreement entered into under duress (¶ 40), and various other allegations of illegal conduct on the part of several federal District Court Judges and Magistrate Judges, court personnel, and the United States Attorney's Office that ultimately resulted in his imprisonment for the unlawful possession and transfer of a machine gun in violation of 18 U.S.C. § 922(o).

Citing *Heck v. Humphrey*, 512 U.S. 477 (1994), appellees argue that Kay's claims are not cognizable in a *Bivens*-type[1] action because appellant has failed to prove that his conviction has been "reversed on direct appeal, expunged by executive order, declared invalid by a [ ] tribunal authorized to make such determinations, or called into question by a federal court's issuance of a writ of habeas corpus." We agree. The Supreme Court's holding in *Heck* makes clear that a claim for damages based on allegations of unlawfulness is not cognizable if a favorable judgment would imply the invalidity of a conviction or sentence unless and until the plaintiff can demonstrate that the conviction or sentence has already been invalidated. *Id.* at 486-87. This appellant has failed to do. Appellant has unsuccessfully

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1. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

challenged his conviction *via* the filing of a motion pursuant to 28 U.S.C. § 2255 in the District Court and a request for a certificate of appealability in this Court. *See M.D. Pa. Crim. No.* 96-cr-00086 (order entered 8/28/98 denying § 2255 motion); *C.A. No.* 98-7545 (order entered 03/16/99 denying request for a certificate of appealability). Because we conclude, on the basis of *Heck*, that it appears beyond doubt Kay can prove no set of facts in support of his claims which would entitle him to relief, the District Court properly granted appellees' motions to dismiss the amended complaint for failure to state a claim. It is, therefore, unnecessary to determine whether the District Court would have properly exercised its discretion in dismissing the complaint pursuant to Rule 8. *See In re Westinghouse Sec. Litig.*, 90 F.3d 696, 702 (3d Cir. 1996).

For the foregoing reasons, we will affirm the District Court's final order dismissing the amended complaint.

## APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED AND FILED JANUARY 21, 1998

## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 97-5813

WILLIAM KAY, Plaintiff,

v.

THE HONORABLE J. ANDREW SMYSER, et. al., Defendants.

### MEMORANDUM

R.F. KELLY, J. JANUARY 21, 1998

William Kay ("Kay") has filed a civil complaint alleging that his constitutional rights were violated. Kay has named twenty-six individuals as Defendants. Twenty-four of those Defendants are federal officials (the "Federal Defendants"). The two remaining non-federal Defendants are Jack McMahon, Esquire, an attorney who represented Kay during a criminal trial, and Ralph Megliola, whose connection to this case is currently unknown. All Defendants, except Ralph

Megliola who has not yet been served,[1] have moved for dismissal of the complaint for failure to comply with Rule 8 of the Federal Rules of Civil Procedure.

Defendants correctly characterize Plaintiff's 30 paragraph complaint as an "incomprehensible diatribe." The document fails to comply, even minimally, with Rule 8(a) which provides that a complaint must contain:

> (1) a short plain statement of the grounds upon which the court's jurisdiction depends, . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

FED. R. CIV. PRO. 8(A). Defendants cannot properly respond to Plaintiff's complaint as drafted. Accordingly, Plaintiff is directed to file an amended complaint which conforms with the Federal Rules of Civil Procedure within 30 days. Additionally, Plaintiff is directed to properly serve all of the Defendants in accordance with Rule 4. Failure to do so will result in dismissal. An Order follows.

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1. Plaintiff has failed to properly serve any of the Defendants in accordance with Rule 4 of the Federal Rules of Civil Procedure.

*Appendix C*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CIVIL ACTION

NO. 97-5813

WILLIAM KAY, Plaintiff,

v.

THE HONORABLE J. ANDREW SMYSER,
et. al., Defendants.

**ORDER**

AND NOW, this 21st day of January, 1998, upon consideration of the Motion to Dismiss filed by the Federal Defendant's and Jack McMahon, Esquire, it is hereby ORDERED that said Motions are DENIED. It is further ORDERED that Plaintiff is DIRECTED:

1. to file an Amended Complaint in accordance with the foregoing Memorandum; and

2. properly serve all Defendants with a copy of the complaint and summons.

Failure to comply with this Order within thirty (30) days will result in dismissal of this action.

BY THE COURT:

s/ Robert F. Kelly
Robert F. Kelly, J.